

In the Matter of: Wastewater Treatment Plant and Sanitary Sewer Construction
Approval No. 16684, Sidney, Indiana, Cause No. 04-W-J-3393
2004 OEA 99 (04-W-J-3393)

TOPICS:

dismissal
12(B)(6)

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Permittee: Michael W. Reed, Esq.; James G. Lauer
Petitioners: John T. and Marilyn A. Collins pro se
IDEM: Nancy Holloran, Esq.

ORDER ISSUED:

November 5, 2004

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

In the Matter of: Wastewater Treatment Plant and Sanitary Sewer Construction
Approval No. 16684, Sidney, Indiana, Cause No. 04-W-J-3393
2004 OEA 99 (04-W-J-3393)

STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	

IN THE MATTER OF:)	
)	
327 ARTICLE 3 CONSTRUCTION)	
PERMIT APPLICATION PLANS AND)	
SPECIFICATIONS FOR SIDNEY)	
WASTEWATER TREATMENT PLANT)	
AND SANITARY SEWER SYSTEMS)	CAUSE NO. 04-W-J-3393
PERMIT APPROVAL NO. 16684)	
SIDNEY INDIANA)	
KOSCIUSKO COUNTY)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL ORDER

This matter having come before the Court on the Motion to Dismiss filed by the Indiana Department of Environmental Management (IDEM) and the Town of Sidney (the "Town"), which pleadings are a part of the Court's record; and the Environmental Law Judge ("ELJ") having read and considered the petitions, motions, and the briefs, responses and replies of the parties, now finds that judgment may be made upon the record; and the ELJ, being duly advised, now makes the following findings of fact and conclusions of law and enters the following Order:

Findings of Fact

1. On July 13, 2004, the IDEM approved the issuance of a construction permit (Approval #16684) to the Town of Sidney, authorizing the construction of a wastewater treatment plant and sanitary sewer.
2. On July 27, 2004, John T. and Marilyn A. Collins (the "Petitioners") filed their Petition for Review of the Permit. In their Petition, the Petitioners alleged that the construction permit should not have been issued because (1) the Town had improperly obtained waivers regarding certain zoning requirements from Town residents; and (2) the residents of the Town would have to bear more costs than originally estimated.
3. A prehearing conference was held on August 31, 2004. All parties were present. The Petitioners stated that they had not signed the waivers complained of in the Petition. The Petitioners were ordered to file an amended Petition for Review on or before September 14, 2004. The Petitioners were instructed that the amended Petition should only state facts that were particular to their situation.

In the Matter of: Wastewater Treatment Plant and Sanitary Sewer Construction
Approval No. 16684, Sidney, Indiana, Cause No. 04-W-J-3393
2004 OEA 99 (04-W-J-3393)

4. On September 14, 2004, the Petitioners filed an Amended Petition for Administrative Review. In the Petition, the Petitioners alleged that the IDEM should not have approved the construction permit because (1) the Petitioners and the residents of the Town would have to bear more costs than originally estimated; and (2) the location selected for the wastewater treatment plant was prone to flooding and the Petitioners are concerned about the possible health affects from the flooding.
5. Specifically, the Petitioners are concerned that the potential for flooding will cause bypassing from the treatment plant and possible contamination of their property and drinking water. The Petitioners also allege that toxins and pathogens will be released from the treatment plant blowers thereby exposing them to harmful vapors. They also allege that they will be unable to improve their property because of possible soil or water contamination.
6. On September 27, 2004, the IDEM and the Town each filed Motions to Dismiss. The Petitioners did not respond to the Motions.

Conclusions of Law

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.
2. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. This Court may treat a Motion to Dismiss as a motion to dismiss for failure to state a claim under Ind. Trial Rule 12(B)(6). “In a 12(B)(6) motion, the court is required to take as true all allegations upon the face of the complaint, and may only dismiss if plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint.” *Dixon v. Siwy*, 661 N.E.2d 600, 603 (Ind.Ct.App. 1996). A 12(B)(6) motion is “made to test the legal sufficiency of the claim, not the supporting facts.” *Blanck v. Indiana Department of Corrections*, 806 N.E.2d 788, 790 (Ind.Ct.App. 2004). The Court must view the pleadings in a light most favorable to the non-moving party and must draw every reasonable inference in favor of that party. *Lattimore v. Amsler*, 758 N.E.2d 568 (Ind.Ct.App. 2001)

In the Matter of: Wastewater Treatment Plant and Sanitary Sewer Construction
Approval No. 16684, Sidney, Indiana, Cause No. 04-W-J-3393
2004 OEA 99 (04-W-J-3393)

4. IC 13-15-6-2 requires that the written request for an adjudicatory hearing must contain the following information:
 - (1) State the name and address of the person making the request.
 - (2) Identify the interest of the person making the request.
 - (3) Identify any persons represented by the person making the request.
 - (4) State with particularity the reasons for the request.
 - (5) State with particularity the issues proposed for consideration at the hearing.
 - (6) Identify the permit terms and conditions that in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action.
5. The Court in *Indiana Office of Environmental Adjudication v. Kunz*, 714 N.E.2d 1190 (Ind.Ct.App. 1999) held that aggrieved persons must meet the requirements of IC 13-15-6-2. If a person fails to meet these requirements, it is appropriate to dismiss the petition for administrative review.
6. In determining whether the petition meets the statutory requirements and states a claim upon which relief can be granted, OEA may only consider whether IDEM's decision was in compliance with the applicable statutes, regulations and policies. This Court does not have the authority to address any other issues.
7. In this matter, the applicable regulations in this matter do not require the IDEM to consider either the potential costs to the residents or whether the selected location will flood in determining whether the proposed construction complies with 327 IAC 3.
8. In addition, this permit is for the construction, not the operation of the treatment plant. To the extent that the Petitioners raise issues regarding the operation of the treatment plant, they are premature. The Town must apply for and receive an operating permit before it can operate the plant. The IDEM presumes that any person that receives a permit will comply with the applicable regulations. OEA may not overturn an IDEM approval upon speculation that the regulated entity will not operate in accordance with the law. *In the Matter of: Objection to the Issuance of Approval No. AW 5404, Mr. Stephen Gettelfinger, Washington, Indiana*, 1998 WL 918589 (Ind. Off .Env. Adjud.)
9. The Petitioners have failed to meet the requirements of IC 13-15-6-2 in that they have failed to "identify the permit terms and conditions that in the judgment of the person making the request, would be appropriate in the case in question to satisfy the requirements of the law governing permits of the type granted or denied by the commissioner's action." Also, in this matter, the Petitioners have failed to raise any issues upon which relief can be granted. Therefore, the Motions to Dismiss should be granted.

**In the Matter of: Wastewater Treatment Plant and Sanitary Sewer Construction
Approval No. 16684, Sidney, Indiana, Cause No. 04-W-J-3393
2004 OEA 99 (04-W-J-3393)**

Order

IT IS THEREFORE ORDERED that the Amended Petition for Administrative Review filed by John T. and Marilyn A. Collins is hereby **DISMISSED**, and the Approval issued by IDEM on July 13, 2004 is hereby **AFFIRMED**.

You are further advised that, pursuant to Indiana Code §4-21.5-5, this Final Order is subject to judicial review. Pursuant to Indiana Code §4-21.5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 5th day of November, 2004.

Hon. Catherine Gibbs
Environmental Law Judge